



BEFORE A HEARING OFFICER

IN THE MATTER OF A NON-MEMBER
OF THE STATE BAR OF ARIZONA,

GEORGE L. MOTHERSHED,

RESPONDENT.

No. 01-1927

**HEARING OFFICER'S
REPORT AND
RECOMMENDATION**

PROCEDURAL HISTORY

A Probable Cause Order was filed on December 31, 2002. A two-count Complaint was filed on December 31, 2002. The Complaint was personally served on Respondent by a staff examiner with the State Bar of Arizona, with such service being accomplished January 3, 2003. As no response to the Complaint was filed by Respondent, a notice of default, pursuant to Rule 53(c)(3), Rules of the Supreme Court, was filed January 28, 2003. There still being no appearance by Respondent in this matter within 10 days, an entry of default against Respondent was entered February 19, 2003.

The State Bar, pursuant to Rule 53(c)(3), Rules of the Supreme Court, requested an aggravation hearing. The hearing, which was duly noticed to Respondent, was set for March 11, 2003 at 9:30 a.m. At the hearing, Christine M. Powell appeared on behalf of the State Bar. Respondent did not appear. *Transcript of March 11, 2003 Hearing [hereafter "Tr."], page 4, line 6 - page 5, line 6.*

RESPONDENT'S MOTION TO DISMISS

Respondent filed a "Special Appearance and Motion to Dismiss," dated February 28, 2003. The State Bar responded to the Motion to Dismiss on March 10, 2003. Respondent was allowed until March 26, 2003 to file a reply in support of his Special Appearance and Motion to Dismiss. Respondent failed to do so, and the matter was deemed submitted on March 26, 2003. *Tr., page 9, lines 20 - 25.*

In his Motion to Dismiss, Respondent argues that the Arizona Supreme Court cannot regulate Respondent as he is not and has never been a licenced attorney in the State of Arizona. Respondent also argues that the Arizona Supreme Court, acting through this Hearing Officer, cannot adjudicate any matter involving Respondent or sanction Respondent for the same reasons.

Respondent is wrong. Under the Arizona Constitution, the practice of law is exclusively within the authority of the Arizona Supreme Court. *Arizona Constitution, Article III, Section 1; Matter of Smith, 189 Ariz. 144, 939 P.2d 422, 424 (1997); In re Creasy, 198 Ariz. 539, 12 P.3d 214, 215 - 216 (2000).* The Arizona Supreme Court may regulate and sanction someone who is practicing law within the State of Arizona even if he or she is not licensed. *In re Creasy, supra.*

The Arizona Constitution grants the Arizona Supreme Court the power to make rules to effectuate its constitutional powers. *Arizona Constitution, Article VI, Sections 1 and 5; In re Smith, supra.* The Arizona Supreme Court's rules provide for jurisdiction over non-members who are practicing law. *Rule 46(b), Rules of the Supreme Court.* Those same Supreme Court rules provide for the appointment of hearing officers. *Rule 48(a), Rules of the Supreme Court.*

Citing Murphy Brothers, Inc. v. Michetti Pipe, 526 U.S. 344, 119 S.Ct. 1322 (1999), Respondent contends that no jurisdiction exists over him as no summons has been issued and served upon him. Due process requires that a party be brought *properly* before an adjudicative

tribunal. Postal Instant Press, Inc. v. Corral Restaurants, 186 Ariz. 535, 925 P.2d 260 (1996); Matter of Maricopa County Juvenile, JS-5860, 169 Ariz. 288, 818 P.2d 723, 725 - 726 (App. 1991). Due process requires notice and an opportunity to be heard. Matter of Maricopa County Juvenile, JS-5860, *supra*, 818 P.2d at 725 - 726. Not every type of adjudicative proceeding, however, requires the issuance and service of a summons. See Matter of Maricopa County Juvenile, JS-5860, *supra*. And Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., *supra*, does not hold that a summons must be issued and served in every type of adjudicative process. Indeed, the United States Supreme Court itself, in attorney disciplinary matters, does not require the issuance of a summons, but rather uses an Order to Show Cause. Rule 8, Rules of the United States Supreme Court.

The rules adopted by the Arizona Supreme Court for this adjudication provide for the service of a Complaint on the respondent, but there is no requirement of either issuance or service of a Summons. Rules 53(c)(1) and 55(b), Rules of the Supreme Court. Here jurisdiction over Respondent was properly obtained by the service of a Complaint in compliance with the Rules of the Arizona Supreme Court.

Respondent's Motion to Dismiss is denied.

THE STATE BAR'S MOTION TO SUPPLEMENT THE RECORD

After the aggravation and mitigation hearing, the State Bar, prior to the matter being deemed submitted on March 26, moved to supplement the record with the Order of Disbarment entered against Respondent by the Supreme Court of Oklahoma on March 18, 2003. Respondent did not respond to the Motion.

The Hearing Officer is entitled to take judicial notice of such records. See In re Ronwin, 139 Ariz. 576, 680 P.2d 107, 110 (1983); In re Horwitz, 180 Ariz. 20, 881 P.2d 352, 355, n. 3

(1994). Therefore, this Hearing Officer takes notice of Respondent's disbarment by the Supreme Court of Oklahoma. The disbarment is based upon, among other things, Respondent's unauthorized practice of law in courts in Arizona, his failure to cooperate in the Oklahoma disciplinary proceedings, and violations of the Oklahoma Rules of Professional Conduct concerning fee sharing with non-lawyers.

FINDINGS OF FACT

By failing to respond timely to the Complaint and thereby being defaulted, Respondent has admitted the well-pled allegations of the Complaint. The following factual facts are found based upon the facts admitted by default and based upon the record presented at the March 11, 2003 hearing:

1. At all times relevant to the Complaint, Respondent was a lawyer admitted to practice in the State of Oklahoma, but was not licensed to practice law in the State of Arizona. *Complaint, ¶ 1.*
2. By a letter dated September 29, 2001 addressed to Robert Persinger, Respondent claimed to be the attorney for Shirley Rhodes, and Respondent represented that he was operating a "law office" in Arizona. The letter did not indicate that Respondent was not admitted to practice law in Arizona. *Complaint, ¶¶ 3 - 4.*
3. In the September 29, 2001 letter, Respondent asserted that, on behalf of Ms. Rhodes, he was terminating the services of Robert Persinger. *Complaint, ¶ 4.*
4. By a letter dated September 24, 2001 to Mr. Persinger, Respondent previously had stated that he was communicating as an attorney on behalf of a client, Shirley Rhodes. This letter also represented that Respondent operated a law office in Arizona but did not disclose that Respondent was not admitted to practice law in the State of Arizona. *Complaint ¶ 5.*

5. By another written communication delivered on or about September 27, 2001 to Mr. Persinger, Respondent claimed to be acting as the attorney for Ms. Rhodes. In that communication, Respondent demanded that Mr. Persinger cooperate in the closing of a loan for the purchase of a manufactured home, demanded that Mr. Persinger arrange to conduct a walk-through of a manufactured home and develop a punch-list for correcting construction items. This September 27, 2001 facsimile communication represented that Respondent was acting as an attorney in the State of Arizona but did not disclose that Respondent was not licensed to practice law in Arizona. *Complaint*, ¶ 6.

6. By a letter dated October 15, 2001, State Bar counsel sent a letter to Respondent requesting a response to the information provided regarding Respondent's unauthorized practice of law in the State of Arizona. *Complaint*, ¶ 7.

7. The October 15, 2001 letter was addressed to Respondent at the address indicated on the Respondent's letters to Mr. Persinger, and the letter must be presumed to have reached Respondent as it was not returned by the Postal Service as undelivered. *Complaint*, ¶ 7.

8. Respondent failed to respond to the October 15, 2001 letter from Bar Counsel. *Complaint*, ¶ 7.

9. On April 16, 1991, Respondent was censured by the Supreme Court of Oklahoma in Oklahoma Bar Association Disciplinary Case No. 971. *Complaint*, ¶ 10.

10. The prior discipline in 1991 was based upon false testimony provided by Respondent. *State ex. rel. Okl. Bar v. Mothershed*, 812 P.2d 382 (Okla. 1991).

11. On April 27, 2001, the Arizona Supreme Court issued a judgment and order of censure against Respondent in file No. 97-17881, for misconduct in violations of E.R. 3.3(a), 4.1(a), 5.5, 7.1(a), 7.5(b) and 8.4 as well as Rules 31(a)(3), 33, and 51, Rules of the Arizona

Supreme Court. *Complaint*, ¶ 11.

12. The prior Arizona disciplinary matter involved proof that Respondent represented himself in Arizona court proceedings as a practicing Arizona attorney, without indicating that he was not licensed to practice law in Arizona and not being admitted *pro hac vice*. In fact, Respondent intimated in such proceedings that he had been admitted *pro hac vice*. *Hearing Exhibit 2*.

13. Respondent applied for membership in the Arizona State Bar, but failed the Bar Examination three times. *Hearing Exhibit 1, page 2*.

14. After failing the Bar Examination for the third time in Arizona, Respondent simply began practicing law in both state and federal courts in Arizona without being licensed by the Arizona Supreme Court and without noting any limitation as to what jurisdictions in which he was authorized to practice law. *Hearing Exhibit 1, page 2 - page 4; page 6 - page 20*.

15. Respondent's conduct has often resulted in inadequate and harmful representation of clients. *Id.*

16. Respondent has a pattern of conduct of appearing in Arizona courts, both state and federal, as an attorney, without any notation that he is not licensed in Arizona. *See, e.g., Hearing Exhibit 3*.

17. Respondent has displayed a calculated indifference and hostility toward regulation of his practice in law by appropriate authorities. *Hearing Exhibit 1, page 5 - 6; page 22 - 22*.

18. He has displayed a calculated indifference and hostility toward court officers and bar personnel. *Id.*

CONCLUSIONS OF LAW

1. This Hearing Officer finds that there is clear and convincing evidence that

Respondent violated Rule 43, Ariz. R. S. Ct., specifically:

- a. ER 4.1 (Truthfulness in Statements to Others).
- b. ER 5.5 (Unauthorized Practice of Law).
- c. ER 8.4(c) and (d) (Misconduct).
2. This Hearing Officer finds that there is clear and convincing evidence that

Respondent violated Rule 31(a)(3), Ariz. R. S. Ct.

3. This Hearing Officer finds that there is clear and convincing evidence that

Respondent violated Subparts (b)(e)(f)(h)(i) of Rule 51, Ariz. R. S. Ct.

4. This Hearing Officer finds there is not clear and convincing evidence that

Respondent violated ER 8.1(b).

ABA STANDARDS

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and/or mitigating factors. This Hearing Officer considered *Standards* # 6 and 7 in determining the appropriate sanction warranted by Respondent's conduct. Specifically, *Standard 6.11* provides that

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the Court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes serious or potentially serious adverse effect on the legal proceeding.

Standard 7.1 provides:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is in violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public or the legal system.

This Hearing Officer then considered aggravating and mitigation factors in this case, pursuant to *Standards 9.22 and 9.32*, respectively. The following factors are present in aggravation: 9.22(a) prior disciplinary offenses, (c) a pattern of misconduct, (d) multiple offenses, and (g) refusal to acknowledge wrongful nature of conduct. No mitigation factors are found.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). In a normal situation where the respondent is or was licensed to practice law in the State of Arizona, a proportionality analysis would result in disbarment. *In re Brady*, 186 Ariz. 370, 923 P.2d 836 (1996).

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994). Prevention of the practice of law in Arizona by someone like Respondent would serve these purposes.

At the Aggravation and Mitigation hearing, State Bar counsel asked the Hearing Officer to issue an injunction against further practicing of law by Respondent. *Transcript, page 7, lines 13 -25*. The Arizona Supreme Court clearly has the jurisdiction and power to issue such an

injunction and jurisdiction and power to issue a contempt citation for violation of that order.

Ariz. Const., Art. IV, Section 5; In re Creasy, supra. The Superior Court, under proper pleadings, may have the ability to issue such an injunction and hold the Respondent in contempt. *A.R.S. § 12-1801.*

This Hearing Officer, however, believes that he lacks the ability to issue such an injunction for two reasons. First, no such relief was requested in the Complaint. This hearing officer believes that Due Process may be violated if such extraordinary relief of which the Respondent has no notice in the Complaint is issued. *Maricopa County Juvenile JS-5860, supra; see In re Myers, 164 Ariz. 558, 795 P.2d 201 (1990).* Additionally, this Hearing Officer does not believe that the Arizona Supreme Court rules grant a hearing officer power to issue or recommend such relief. *See Supreme Court Rules 48(a) and (d); Rule 52(a), Ariz. R.S. Ct.*

Although Respondent's actions warrant disbarment if he ever had been licensed in Arizona, the maximum sanction which can be imposed is a censure. *In re Mothershed, S.B. 01-0076-D, Disciplinary Commission 97-1781 (April 17, 2001); In re Menor, Disciplinary Commission 95-1601; compare Matter of Fleishman, 188 Ariz. 106, 933 P.2d 563 (1997); In re Lehman, 168 Ariz. 174, 812 P.2d 992 (1991).*

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends the following:

1. That Respondent be censured.
2. That all costs of these proceedings be assessed against Respondent.

DATED this 21st day of April, 2003.



Mark S. Sifferman
Hearing Officer 9J

Original filed with the Disciplinary Clerk
this 21st day of April, 2003.

Copy of the foregoing mailed
this 21st day of April, 2003, to:

George L. Mothershed
3440 West Cheryl Drive, Suite A-250
Phoenix, AZ 85051-9578

Christine M. Powell
Bar Counsel
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

